

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SANDRA STRISSEL,

Plaintiff,

CASE NO. C16-0374-RJB-MAT

V.

CAROLYN W. COLVIN, Acting
Commissioner of Social Security,

Defendant.

REPORT AND RECOMMENDATION
RE: SOCIAL SECURITY DISABILITY
APPEAL

Plaintiff Sandra Strissel proceeds through counsel in her appeal of a final decision of the Commissioner of the Social Security Administration (Commissioner). The Commissioner denied plaintiff's applications for Disability Insurance Benefits (DIB) and Supplemental Security Income (SSI) after a hearing before an Administrative Law Judge (ALJ). Having considered the ALJ's decision, the administrative record (AR), and all memoranda of record, the Court recommends this matter be REMANDED for further administrative proceedings.

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**REPORT AND RECOMMENDATION
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FACTS AND PROCEDURAL HISTORY

Plaintiff was born on XXXX, 1959.¹ She completed high school, attended less than a year of college, and previously worked as a sales representative (petroleum products), membership solicitor, receptionist, and animal caretaker. (AR 38-39, 246.)

Plaintiff filed applications for DIB and SSI in January 2013, alleging disability beginning March 1, 2006. (AR 220-33.) The applications were denied initially and on reconsideration.

On April 21, 2014, ALJ Larry Kennedy held a hearing, taking testimony from plaintiff and a vocational expert (VE). (AR 47-82.) At hearing, plaintiff amended her alleged onset date to June 19, 2009. (AR 52-53.) On July 29, 2014, the ALJ issued a decision finding plaintiff not disabled from the amended alleged onset date through the date of the decision. (AR 22-40.)

Plaintiff timely appealed. The Appeals Council denied plaintiff's request for review on January 29, 2016 (AR 1-5), making the ALJ's decision the final decision of the Commissioner. Plaintiff appealed this final decision of the Commissioner to this Court.

JURISDICTION

The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. § 405(g).

DISCUSSION

The Commissioner follows a five-step sequential evaluation process for determining whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it must be determined whether the claimant is gainfully employed. The ALJ found plaintiff had not engaged in substantial gainful activity since the amended alleged onset date. At step two, it must be determined whether a claimant suffers from a severe impairment. The ALJ found severe

¹ Plaintiff's date of birth is redacted back to the year in accordance with Federal Rule of Civil Procedure 5.2(a) and the General Order of the Court regarding Public Access to Electronic Case Files.

1 plaintiff's palindromic rheumatism, lumbar spine degenerative disc disease, osteoarthritis,
2 hypertension, migraines, gastro esophageal reflux disease, depression, anxiety, and pain disorder.
3 Step three asks whether a claimant's impairments meet or equal a listed impairment. The ALJ
4 found plaintiff's impairments did not meet or equal the criteria of a listed impairment.

5 If a claimant's impairments do not meet or equal a listing, the Commissioner must assess
6 residual functional capacity (RFC) and determine at step four whether the claimant has
7 demonstrated an inability to perform past relevant work. The ALJ found plaintiff able to
8 perform light work, but could only occasionally balance, stoop, kneel, and crouch, could not
9 climb ladders/ropes/scaffolds/ramps/stairs or crawl, and should avoid concentrated exposure to
10 extreme cold and vibration. Plaintiff could perform simple, routine tasks and follow short,
11 simple instructions, do work that needs little or no judgment, and perform simple duties that can
12 be learned on the job in a brief period; has average ability to perform sustained work activities
13 (manage attention, concentration, persistence, and pace) in an ordinary work setting on a regular
14 and continuing basis (eight hours a day, five days a week or equivalent work schedule) within
15 customary tolerances of employers' rules regarding sick leave and absence; needs an
16 environment with minimal supervisor contact (not precluding all contact; meaning contact that
17 does not occur regularly, and does not preclude simple and superficial exchanges or being in
18 proximity to a supervisor); can work in proximity to a few co-workers, but not in a cooperative
19 or team effort; needs an environment that requires no more than minimal interactions with a few
20 coworkers and is predictable, with few work setting changes; and would not deal with the
21 general public as in a sales position or where the general public is frequently encountered as an
22 essential element of the work, although incidental contact of a superficial nature is not precluded.
23 With that assessment, the ALJ found plaintiff unable to perform past relevant work.

If a claimant demonstrates an inability to perform past relevant work, or has no past relevant work, the burden shifts to the Commissioner to demonstrate at step five that the claimant retains the capacity to make an adjustment to work that exists in significant levels in the national economy. With the assistance of a VE, the ALJ found plaintiff capable of performing other jobs, such as work as an electronic accessory assembler, small products assembler, and inspector/hand packager.

This Court’s review of the ALJ’s decision is limited to whether the decision is in accordance with the law and the findings supported by substantial evidence in the record as a whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). *Accord Marsh v. Colvin*, 792 F.3d 1170, 1172 (9th Cir. 2015) (“We will set aside a denial of benefits only if the denial is unsupported by substantial evidence in the administrative record or is based on legal error.”) Substantial evidence means more than a scintilla, but less than a preponderance; it means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989). If there is more than one rational interpretation, one of which supports the ALJ’s decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002).

Plaintiff argues the ALJ committed two different errors associated with step five and erred in the consideration of medical opinions. She requests remand for a finding of disability as of her 55th birthday and for a determination of disability prior to age 55. The Commissioner argues the ALJ's decision has the support of substantial evidence and should be affirmed.

Age Category

Age is considered as a vocational factor and categorized as follows: “younger person” (under age 50); “closely approaching advanced age” (age 50-54); and “advanced age” (age 55 or

1 older). 20 C.F.R. §§ 404.1563(e), 416.963(e). The Commissioner's regulations state:

2 We will not apply the age categories mechanically in a borderline
 3 situation. If you are within a few days to a few months of reaching
 4 an older age category, and using the older age category would
 5 result in a determination or decision that you are disabled, we will
 6 consider whether to use the older age category after evaluating the
 7 overall impact of all the factors of your case.

8 §§ 404.1563(b), 416.963(b). *See also* Program Operations Manual System (POMS) DI
 9 25015.006 at B (“We do not have a more precise programmatic definition for the phrase ‘within
 10 a few days to a few months.’ The term ‘a few’ is defined using its ordinary meaning, a small
 11 number. Usually, we consider a few days to a few months to mean a period not to exceed 6
 12 months.””)²

13 A claimant of advanced age, limited to light work, and unable to perform past relevant
 14 work qualifies as disabled unless the ALJ finds she has skills that are readily transferable to a
 15 significant range of semi-skilled or skilled work within the individual’s functional capacity. 20
 16 C.F.R. pt. 404, subpt. P, app. 2 (the Medical-Vocational Guidelines or “grids”) § 202.00(c); *Bray*
 17 *v. Comm’r*, 554 F.3d 1219, 1229 n.9 (9th Cir. 2009). Plaintiff was less than five months from
 18 entering the advanced age category at the time of the ALJ’s decision, and avers the ALJ erred by
 19 failing to consider whether she was on the borderline between age categories.

20 In a borderline situation, “an ALJ is not *required* to use an older age category, even if the
 21 claimant is within a few days or a few months of reaching an older age category.” *Lockwood v.*
 22 *Comm’r SSA*, 616 F.3d 1068, 1071 (9th Cir. 2010) (emphasis in original). Rather, the ALJ is

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 22 ² “POMS constitutes an agency interpretation that does not impose judicially enforceable duties
 23 on either this court or the ALJ.” *Lockwood v. Comm’r SSA*, 616 F.3d 1068, 1073 (9th Cir. 2010). Agency
 24 interpretations are “entitled to respect,” but only to the extent they have the “power to persuade.” *Id.*
 25 (internal quotation marks and quoted sources omitted). *See also Warre v. Comm’r SSA*, 439 F.3d 1001,
 26 1005 (9th Cir. 2006) (“The POMS does not have the force of law, but it is persuasive authority.”)

1 required by regulation only to *consider* whether to use an older age category. *Id.* at 1070. An
 2 ALJ may be found to satisfy this consideration requirement by, for example, mentioning the
 3 claimant's date of birth and age category on the date of the ALJ's decision, citing the regulation
 4 that prohibits application of the age categories mechanically in a borderline situation, *see* §§
 5 404.1563, 416.963, and evaluating the overall impact of all the factors in the claimant's case in
 6 reliance on the testimony of a VE. *Id.* at 1071-72.³ There is no "obligation to make express
 7 findings incorporated in the ALJ's opinion." *Id.* at 1073. *Accord Bowie v. Comm'r*, 539 F.3d
 8 395, 399-401 (6th Cir. 2008) (as amended).

9 Plaintiff would have turned 55 in just over four months after the ALJ's decision.
 10 Consistent with *Lockwood*, the ALJ noted Plaintiff's date of birth and cited to 20 C.F.R. §§
 11 404.1563, 416.963. (AR 39.) The ALJ also relied on the VE's testimony in finding, with
 12 consideration of plaintiff's age and all other relevant factors, there were other jobs she could
 13 perform. (AR 39-40.) The VE identified those jobs after plaintiff testified as to her date of birth
 14 and age, 54, at the time of the hearing (AR 53-54), and after the ALJ asked the VE to consider
 15 plaintiff's age, among other factors, in identifying jobs she could perform (AR 75-76).

16 However, this case also differs from *Lockwood*. The ALJ's decision indicates,
 17 accurately, that plaintiff was 49, a "younger individual," on the June 19, 2009 amended alleged
 18 disability onset date, but does not mention her age or age category at the time of the July 29,
 19 2014 decision, some five years and almost two age categories later. (AR 39.) The ALJ also

20 ³ In *Lockwood*, 616 F.3d at 1071-72, the Ninth Circuit found that, in mentioning the claimant's
 21 date of birth and age: "Clearly the ALJ was aware that Lockwood was just shy of her 55th birthday, at
 22 which point she would become a person of advanced age." The citation to 20 C.F.R. § 404.1563 "shows
 23 that the ALJ knew she had discretion 'to use the older age category after evaluating the overall impact of
 all the factors of [Lockwood's] case.'" *Id.* at 1072. The Court was further satisfied the ALJ did not apply
 the age categories mechanically because the ALJ evaluated the overall impact of all factors when relying
 on the VE's testimony. *Id.*

1 reflects his consideration of Rule 202.21, a grid rule addressing a “younger” individual. (*Id.*)
2 There was no borderline age situation between the younger and closely approaching advanced
3 age categories, given that, whether considered as a younger individual under Rule 202.21 or an
4 individual closely approaching advanced age under Rule 202.14, the grids would have directed a
5 finding of “not disabled.” 20 C.F.R. pt. 404, subpt. P, app. 2.

6 The regulations state that the Commissioner considers the “age categories that apply to
7 you during the period for which we must determine if you are disabled.” §§ 404.1563(b),
8 416.963(b). *See also Shumaker v. Astrue*, 657 F. Supp. 2d 1178, 1185 (D. Mon. 2009) (“The
9 regulation directs the ALJ to consider Shumaker’s age throughout the time period for which
10 disability is sought, not just the alleged onset date.”) The ALJ here considered plaintiff’s claim
11 as of the June 19, 2009 amended alleged disability onset date through the date of the July 29,
12 2014 decision. Plaintiff was eligible for DIB if she established her disability prior to her
13 December 31, 2010 date last insured (AR 24), *see* §§ 404.131, 404.321, and to SSI benefits,
14 payable the month following her January 17, 2013 application date, § 416.335, if she established
15 disability prior to the date of the ALJ’s decision.

16 There is some support for an inference the ALJ considered the borderline age situation
17 presented in this case. *See generally Lockwood*, 616 F.3d at 1072 n.3 (“We presume that ALJs
18 know the law and apply it in making their decisions.”) However, the ALJ’s depiction of plaintiff
19 as a younger individual on the amended alleged disability onset date and her consideration of a
20 grid rule under that age category undermines the support for a conclusion the ALJ considered
21 using an advanced age category in the borderline situation presented in this case. The Court, for
22 this reason, finds remand warranted.

23 The Court does not, however, find it proper to grant plaintiff’s request for a finding of

1 disability as of her 55th birthday. The Social Security Act allows for judicial review only of the
 2 agency's "final decision," which, in this case, is the ALJ's decision. *See* 42 U.S.C. § 405(g); 20
 3 C.F.R. §§ 404.981, 416.1481. The ALJ adjudicated the time period from June 19, 2009 through
 4 July 29, 2014. (AR 40.) Plaintiff's 55th birthday fell after the adjudicated time period, meaning
 5 no final decision has been rendered by the agency regarding that period. The Court, as such,
 6 lacks jurisdiction to make the finding requested and recommends this matter be remanded for
 7 proper consideration of plaintiff's disability status in relation to all applicable age categories.

8 Inconsistency between Jobs and RFC

9 The Dictionary of Occupational Titles (DOT) raises a rebuttable presumption as to job
 10 classification. *Johnson v. Shalala*, 60 F.3d 1428, 1435-36 (9th Cir. 1995). Pursuant to Social
 11 Security Ruling (SSR) 00-4p, an ALJ has an affirmative responsibility to inquire as to whether a
 12 VE's testimony is consistent with the DOT and, if there is a conflict, determine whether the VE's
 13 explanation for the conflict is reasonable. *Massachi v. Astrue*, 486 F.3d 1149, 1152-54 (9th Cir.
 14 2007). As stated by the Ninth Circuit: "[A]n ALJ may rely on expert testimony which
 15 contradicts the DOT, but only insofar as the record contains persuasive evidence to support the
 16 deviation." *Johnson*, 60 F.3d at 1435-36 (VE testified about the characteristics of local jobs and
 17 found their characteristics to be sedentary, despite DOT classification as light work). "Evidence
 18 sufficient to permit such a deviation may be either specific findings of fact regarding the
 19 claimant's residual functionality, or inferences drawn from the context of the expert's
 20 testimony." *Light v. Social Sec. Admin.*, 119 F.3d 789, 794 (9th Cir. 1997) (citations omitted).

21 An ALJ's error may be deemed harmless where it is "'inconsequential to the ultimate
 22 nondisability determination.'" *Molina v. Astrue*, 674 F.3d 1104, 1115 (9th Cir. 2012) (citations
 23 omitted). The court looks to "the record as a whole to determine whether the error alters the

1 outcome of the case.” *Id.* The failure to affirmatively ask regarding consistency with the DOT
 2 may be found harmless where, for example, there is no actual conflict with the DOT or where the
 3 VE provided “sufficient support for her conclusion so as to justify any potential conflicts[.]”
 4 *Massachi*, 486 F.3d at 1153-54 [n. 19] (finding, in that case, “an apparent conflict with no basis
 5 for the vocational expert’s deviation.”))

6 In this case, the RFC and VE hypothetical limited plaintiff to simple, routine tasks,
 7 following short, simple instructions, with work needing little or no judgment and performance of
 8 simple duties that can be learned on the job in a short time. (AR 28, 75.) Plaintiff notes the
 9 ALJ’s failure to explicitly inquire into consistency of the VE’s testimony with the DOT. She
 10 maintains harm given that the three jobs identified by the VE require a “reasoning level” two or
 11 three, *see* DOT 729.384-010 (electronics accessory assembler; reasoning 3); DOT 739.687-030
 12 (small products assembler; reasoning 2); DOT 559.687-074 (inspector/hand packager; reasoning
 13 2), while the relevant RFC limitations are consistent only with reasoning level one jobs.

14 The DOT defines jobs requiring reasoning level one as requiring the ability to “[a]pply
 15 commonsense understanding to carry out simple one- or two-step instructions. Deal with
 16 standardized situations with occasional or no variables in or from these situations encountered on
 17 the job.” DOT, App. C. Reasoning level two jobs require the ability to “[a]pply commonsense
 18 understanding to carry out detailed but uninvolved written or oral instructions. Deal with
 19 problems involving a few concrete variables in or from standardized situations.” *Id.* Reasoning
 20 level three work requires that an individual: “Apply commonsense understanding to carry out
 21 instructions furnished in written, oral, or diagrammatic form. Deal with problems involving
 22 several concrete variables in or from standardized situations.” *Id.*

23 In *Zavalin v. Colvin*, 778 F.3d 842, 846-48 (9th Cir. 2015), the Ninth Circuit found an

1 apparent conflict between an RFC limitation to simple, repetitive tasks and reasoning level three
2 work. The ALJ failed to recognize the inconsistency or reconcile the conflict, and the record did
3 not allow for a finding of harmlessness. *Id.* at 848. In *Rounds v. Comm'r, SSA*, 807 F.3d 996,
4 1003-04 (9th Cir. 2015), the Court found an apparent conflict between an RFC limiting a
5 claimant to “1 to 2 step tasks” and jobs requiring a reasoning level two. Again, the ALJ had not
6 recognized or reconciled the conflict. *Id.* at 1004. Nor was the error harmless. The ALJ had not
7 merely restricted the claimant to ““simple”” or ““repetitive”” tasks and had, instead, expressly
8 limited the claimant to ““one to two step tasks”” and there was no explanation as to why that
9 limitation “should not be taken at face value.” *Id.* at 1004 & n.6. This Court employs an
10 approach requiring a close reading of the ALJ’s RFC assessment in order to determine how it
11 compares to reasoning level requirements. *See, e.g., Skeens v. Astrue*, 903 F. Supp. 2d 1200,
12 1208-10 (W.D. Wash. 2012) (citing and describing cases; finding ability to understand ““simple
13 1 to 2 step instructions”” and ““perform simple tasks’ . . . analogous to reasoning level 1 only.””).

14 The ALJ did not here ask whether the VE’s testimony was consistent with the DOT.
15 However, both the ALJ and plaintiff’s counsel inquired into how the occupations identified by
16 the VE were consistent with specific RFC limitations. (AR 76-77.) In relation to the challenge
17 raised here, plaintiff’s counsel asked: “[C]an you explain how those jobs are also consistent with
18 simple work that involves little or no judgment?” (AR 77.) The VE answered: “Yeah, . . . one
19 of the characteristics I used for selecting them was the DOT classifies these jobs as repetitive . . .
20 and repetitive is defined as only a few number of tasks, simple tasks, that are repeated throughout
21 the work day over and over again, so we have the [specific vocational preparation (SVP)] that
22 suggests it doesn’t take long to learn the jobs, and the jobs are simple and there’s not much else
23 to them.” (AR 77-78.) In the decision, the ALJ acknowledged inconsistencies with the DOT,

1 and stated, in relevant part, that the VE explained the jobs identified involved “unskilled, simple,
 2 repetitive tasks, SVP level 2,” and noted “the DOT classifies them as ‘repetitive’ work, defined
 3 as simple tasks that are not repeated.” (AR 40.)

4 This case contains an inquiry on the record into consistency between relevant RFC
 5 limitations and the jobs identified at step five, and the ALJ’s adoption of a reasonable
 6 explanation for an apparent inconsistency between the limitations and the reasoning levels of
 7 those jobs. That the VE specifically referred in his testimony to the SVP⁴ for the jobs, and not
 8 the reasoning levels, does not detract from the fact his testimony provided a reasonable
 9 explanation for any inconsistency between the RFC limitations and both the SVP and reasoning
 10 levels of the jobs: “. . . so we have the SVP that suggests it doesn’t take long to learn the jobs,
 11 *and the jobs are simple and there’s not much else to them.*” (AR 78 (emphasis added).) This
 12 case is also distinguishable from cases in which claimants were explicitly limited to performing
 13 one- and/or two-step tasks. *See Rounds*, 807 F.3d at 1004 & n.6 (distinguishing the limitation to
 14 “one or two step tasks” as not “merely” a restriction to ““simple”” or ““repetitive”” tasks and citing
 15 cases finding no inconsistency between the latter restrictions and level two reasoning, including,
 16 *inter alia, Abrew v. Astrue*, No. 07-35243, 2008 U.S. App. LEXIS 27207 at *4-5 (9th Cir. Dec.
 17 17, 2008) (no conflict between limitation to simple tasks and reasoning level two work); *Lara v.*
 18 *Astrue*, No. 07-55903, 2008 U.S. App. LEXIS 27070 at *2-3 (9th Cir. Nov. 19, 2008) (no
 19 conflict between simple, repetitive tasks and reasoning level two work)); *Morgan v. Astrue*, No.
 20 11-422, 2011 U.S. Dist. LEXIS 150675 at *17-22 (W.D. Wash. Nov. 28, 2011) (“Importantly,

21 ⁴ “‘SVP’ is defined in the DOT as ‘the amount of lapsed time required by a typical worker to
 22 learn the techniques, acquire the information, and develop the facility needed for average performance in
 23 a specific job-worker situation.’” *Bray*, 554 F.3d at 1231 n.4 (citing DOT, App. C). An SVP 2, for
 example, “means ‘anything beyond a short demonstration up to and including 1 month[.]’” *Id.* Also,
 “unskilled work corresponds to an SVP of 1-2; semi-skilled work corresponds to an SVP of 3-4; and
 skilled work corresponds to an SVP of 5-9 in the DOT.” *Id.* (quoting SSR 00-4p).

1 the ALJ did not limit Ms. Morgan to only one- to two-step tasks [which would] more clearly
 2 indicate a limitation to reasoning level 1 jobs[.]”; finding no conflict between moderate
 3 limitations in concentration, persistence, and pace and the detailed but uninvolved work required
 4 for level 2 reasoning), *adopted by* 2011 U.S. Dist. LEXIS 143389 (Dec. 13, 2011); *Meissl v.*
 5 *Barnhart*, 403 F. Supp. 2d 981, 983 (C.D. Cal. 2005) (no conflict between a limitation to simple
 6 repetitive tasks and reasoning level two work).

7 Finally, even if the Court did not find the VE’s testimony to support a deviation between
 8 the RFC and the single reasoning level three job identified at step five, it remains that the
 9 testimony does persuasively support any deviation between the RFC and the two reasoning level
 10 two jobs. Considering the reasoning level two jobs alone, there is substantial evidence support
 11 for the ALJ’s decision at step five. (See AR 40 (identifying 230,000 small products assembler
 12 jobs nationally and 2,400 in Washington State and 205,000 inspector/hand packager jobs
 13 nationally and 3,800 in Washington State)); and see, e.g., *Gutierrez v. Comm’r of Soc. Sec.*, 740
 14 F.3d 519, 528-29 (9th Cir. 2014) (2,500 jobs in California and 25,000 jobs in several regions of
 15 the country constituted significant numbers of jobs to support step five finding); *Meissl*, 403 F.
 16 Supp. 2d at 982 & n.1 (approximately 1,700 jobs locally and 38,000 jobs nationally significant).

17 Medical Opinions

18 In general, more weight should be given to the opinion of a treating physician than to a
 19 non-treating physician, and more weight to the opinion of an examining physician than to a non-
 20 examining physician. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996). Contradicted opinions
 21 may not be rejected without “specific and legitimate reasons’ supported by substantial evidence
 22 in the record for so doing.” *Id.* at 830-31 (quoted sources omitted). Plaintiff argues the ALJ
 23 improperly weighed the medical evidence by rejecting opinions from treating physician Dr.

1 Denise Kraft and consultative psychological examiner Dr. Alysa Ruddell, and assigning
2 significant weight to the opinions of non-examining State agency physicians' Drs. Robert
3 Hander, Kent Reade, and Michael Brown.

4 A. Dr. Denise Kraft

5 Treating physician Dr. Kraft completed a physical functional evaluation of plaintiff in
6 December 2012. (AR 853-57.) She assessed moderate to marked interference with the ability to
7 perform one or more basic work-related activities due to plaintiff's back pain status post surgery,
8 palindromic arthritis, incontinence, fatigue, and depression/anxiety, and opined plaintiff could
9 "maybe" perform sedentary work. (AR 854-55.)

10 The ALJ gave these opinions little weight except to the extent the assessment of
11 sedentary capacity supported the conclusion plaintiff is capable of at least some work activity
12 and her impairments do not preclude her from working. (AR 36.) The ALJ noted the provision
13 of few details of any objective clinical findings supporting the degree of severity opined; the
14 reference to a blank ("not done") range of motion chart as supporting the limitations and
15 restrictions assessed; inconsistency with Dr. Kraft's own contemporaneous chart notes/exam
16 records, as previously described in the decision and which "consistently noted 'overall normal'
17 musculoskeletal and neurologic findings and 'no active' synovitis, joint erythema, or edema, and
18 included the examination notes from the same date of the assessment indicating a normal back
19 exam, musculoskeletal system, and neurological exam (*see* AR 575-77); and Dr. Kraft's apparent
20 reliance on plaintiff's self-report of symptoms/limitations "('sleeps 12 to 16 hours/day'; 'anxiety
21 triggers stress . . . goes to bathroom 3 to 4 times per hours')" (AR 854). (AR 36.)

22 In assigning weight to a medical opinion, an ALJ considers, *inter alia*, the amount of
23 relevant evidence presented in support, particularly medical signs and laboratory findings, the

1 explanation provided, and consistency with the record as a whole. 20 C.F.R. §§ 404.1527(c)(3)-
 2 (4), 416.927(c)(3)-(4). “An ALJ may reject a treating physician’s opinion if it is based ‘to a
 3 large extent’ on a claimant’s self-reports that have been properly discounted as incredible.”
 4 *Tommasetti v. Astrue*, 533 F.3d 1035, 1041 (9th Cir. 2008) (quoted source omitted). A
 5 physician’s opinion may also be rejected based on inconsistency with the record, *see id.*, and/or
 6 discrepancy or contradiction between the opinion and the physician’s own notes or observations,
 7 *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005). *See also Batson v. Commissioner*, 359
 8 F.3d 1190, 1195 (9th Cir. 2004) (treating physician’s opinions may be discounted when in the
 9 form of a checklist, lacking supportive objective evidence, contradicted by other statements and
 10 assessments, and based on a claimant’s subjective descriptions of pain); *Thomas*, 278 F.3d at 957
 11 (“The ALJ need not accept the opinion of any physician, including a treating physician, if that
 12 opinion is brief, conclusory, and inadequately supported by clinical findings.”)

13 The ALJ in this case properly provided specific and legitimate reasons for rejecting the
 14 contradicted opinion evidence from Dr. Kraft. Contrary to plaintiff’s contention, there is no
 15 indication the ALJ failed to consider Dr. Kraft’s status as a treating physician. Nor did the ALJ
 16 improperly focus on the form completed without consideration of the record as a whole,
 17 selectively cite to the record, or otherwise fail to properly consider the medical evidence.
 18 Plaintiff further fails to show the ALJ improperly inferred reliance on plaintiff’s discredited self-
 19 report,⁵ misconstrued evidence of inconsistency with the record, erred in considering the opinion
 20 plaintiff could “maybe” perform sedentary work, or establish any basis for recontacting Dr. Kraft
 21 before rejecting her opinion. The record, instead, provides ample support for the ALJ’s
 22 reasoning and the decision itself reveals his careful, reasonable consideration of the record as a

23 ⁵ Plaintiff does not challenge the ALJ’s credibility assessment (*see* AR 30-35).

1 whole. *See generally Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1998) (ALJ may reject
2 physicians' opinions "by setting out a detailed and thorough summary of the facts and conflicting
3 clinical evidence, stating his interpretation thereof, and making findings.")

4 Dr. Kraft also completed a mental capacity assessment form in April 2014, assessing,
5 *inter alia*, marked limitations in plaintiff's ability to remember locations and work-like
6 procedures, to carry out detailed instructions, and to respond appropriately to changes in the
7 work setting. (AR 851-52.) The ALJ assigned these opinions little to no weight based on the
8 lack of supporting medical evidence. (AR 37.) He noted the absence of any mental health
9 diagnoses on the form, that the form consisted entirely of functional rating check-blocks without
10 supporting medical evidence or explanation to substantiate the degree of limitations opined, and
11 that medical evidence from Dr. Kraft included examination and chart notes that do not indicate
12 any mental status examinations ("MSE") or discussion of mental impairments/limitations, except
13 for notes indicating plaintiff had depression and was taking medications. (*Id.* (citing AR 536-52,
14 752-815, 826-30).)

15 Again, plaintiff fails to demonstrate error. The ALJ provided specific and legitimate
16 reasons for the weight assigned to these opinions. *See, e.g.*, 20 C.F.R. §§ 404.1527(c)(3)-(4),
17 416.927(c)(3)-(4); *Bayliss*, 427 F.3d at 1216; *Batson*, 359 F.3d at 1195; and *Thomas*, 278 F.3d at
18 957, as described *supra*; and *see Molina*, 674 F.3d at 1111 (an ALJ may reject "check-off
19 reports" that do not contain any explanation of the bases for their conclusions); *cf. Esparza v.*
20 *Colvin*, No. 13-16522, 2015 U.S. App. LEXIS 20534 at *5-6 (9th Cir. Nov. 25, 2015) ("The
21 treating physician's extensive notes are consistent with the check-box forms and provide the
22 basis for his opinions.") Plaintiff, moreover, fails to acknowledge the RFC limitations
23 nonetheless accounting for limitations assessed by Dr. Kraft, such as the limitations to simple,

1 routine tasks, following short, simple instructions, work needing little or no judgment, simple
2 duties that can be learned in a brief period of time, a work environment that is predictable, and
3 few work setting changes. (AR 28.)

4 The ALJ is responsible for resolving conflicts in the medical record, *Carmickle v.*
5 *Comm'r of SSA*, 533 F.3d 1155, 1164 (9th Cir. 2008), and when evidence reasonably supports
6 either confirming or reversing the ALJ's decision, the court may not substitute its judgment for
7 that of the ALJ, *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). The Court here finds the
8 ALJ's consideration of the evidence from Dr. Kraft supported by substantial evidence.

9 B. Dr. Alysa Ruddell

10 Dr. Ruddell, a consultative examiner for the Department of Social and Health Services,
11 completed a psychological evaluation of plaintiff in December 2012. (AR 454-58.) She
12 assessed a severe limitation in the ability to learn new tasks and marked limitations in relation to
13 detailed tasks, the ability to adapt to changes in routine work settings, to communicate and
14 perform effectively, maintain appropriate behavior, complete a work day/week without symptom
15 interruptions, and set realistic goals and plan independently. (AR 456.) Dr. Ruddell also
16 assessed a Global Assessment of Functioning (GAF) score of 45, describing "serious symptoms"
17 or "any serious impairment in social, occupational, or school functioning." Diagnostic and
18 Statistical Manual of Mental Disorders 34 (4th ed. 2000).

19 The ALJ gave Dr. Ruddell's opinions little to no weight. While acknowledging objective
20 evidence of mental health conditions and some resulting limitations, the ALJ found Dr.
21 Ruddell's opinions to rely heavily on plaintiff's self-reported symptoms and complaints, which
22 the ALJ did not find entirely credible. (AR 37.) He noted Dr. Ruddell's observation:
23 "Information in this evaluation represents client report." (*Id.*; AR 454 (indicating no records

1 available for review).) The ALJ stated that, although there was some testing, Dr. Ruddell
 2 indicated plaintiff's "performance raised 'concerns about effort', which further calls into
 3 question the overall reliability of the report/opinion." (AR 37; AR 457.) He also found the
 4 opinion not consistent with those of the State agency psychological consultants, as well as with
 5 plaintiff's range of activities, which indicated her mental impairments, "although limiting, would
 6 not prevent her from performing simple, routine unskilled work with minimal social interaction."
 7 (*Id.*) He found it clear the GAF score was based on plaintiff's subjective report regarding her
 8 impairments and not an objective analysis of her actual functional abilities. (*Id.* at 37 n.5.)

9 Plaintiff avers that, because Dr. Ruddell conducted an interview, administered an MSE,
 10 and recorded his observations, her opinions were not largely based on plaintiff's self-reports.

11 *See Woodsum v. Astrue*, 711 F. Supp. 2d 1239, 1257 (W.D. Wash. 2010) ("Dr. Wingate did not
 12 just consider what plaintiff reported, but also personally observed plaintiff and performed a
 13 [MSE] each time as well.") Plaintiff downplays Dr. Ruddell's concern about effort, stating she
 14 did not diagnose malingering and would be professionally prohibited from rendering opinions
 15 about mental limitations if she thought effort invalidated the entire MSE and observations.

16 However, as reflected above, an ALJ may discount a physician's opinions found to be
 17 based largely on the discredited subjective complaints of a claimant. *Tommasetti*, 533 F.3d at
 18 1041. A claimant's failure to "exert adequate effort during testing[]" is properly considered in
 19 support of such a conclusion. *Chaudhry v. Astrue*, 688 F.3d 661, 671 (9th Cir. 2012) (despite
 20 physician's personal observation of a claimant and review of x-rays and MRI, the ALJ's
 21 conclusion the opinion was based primarily on claimant's discredited self-report was supported
 22 by, among other things, physician's own observation of failure to exert adequate effort).

23 The ALJ here accurately noted Dr. Ruddell's statement that information in the evaluation

1 represented plaintiff's report (AR 454) and that Dr. Ruddell was "concerned about effort[]" in
2 the testing (AR 457). The ALJ acknowledged the existence of objective evidence and testing,
3 while reasonably concluding the opinions relied more heavily on plaintiff's self-reporting, which
4 the ALJ found not credible and were called into question by Dr. Ruddell's own concerns as to
5 the reliability of testing results. *Chaudhry*, 688 F.3d at 671. Cf. *Ghanim v. Colvin*, 763 F.3d
6 1154, 1162-63 (9th Cir. 2014) (ALJ "offered no basis" for conclusion medical opinions were
7 based more heavily on self-reports). To the extent plaintiff favors a contrary interpretation of
8 this evidence, she fails to demonstrate the ALJ's interpretation was not rational. *Morgan v.*
9 *Commissioner of the SSA*, 169 F.3d 595, 599 (9th Cir. 1999) ("Where the evidence is susceptible
10 to more than one rational interpretation, it is the ALJ's conclusion that must be upheld.")

11 The ALJ also provided two additional, specific and legitimate reasons for his assessment
12 by finding inconsistency with the opinions of the State agency psychological consultants and
13 with plaintiff's range of activities. *See id.* at 603 (ALJ appropriately considers inconsistencies
14 between physicians' reports), and *Rollins v. Massanari*, 261 F.3d 853, 856 (9th Cir. 2001)
15 (affirming ALJ's rejection of a treating physician's opinion that was inconsistent with the
16 claimant's level of activity). Plaintiff criticizes the ALJ's reliance on the opinions of the non-
17 examining physicians, as addressed below, and denies her limited and sporadic daily activities
18 support an ability to perform sustained work functions. However, she again offers no more than
19 a different interpretation of the evidence. The ALJ is responsible for assessing the medical
20 evidence and resolving any conflicts or ambiguities in the record. *See Treichler v. Comm'r of*
21 *Soc. Sec. Admin.*, 775 F.3d 1090, 1098 (9th Cir. 2014); *Carmickle*, 533 F.3d at 1164. Finding
22 the ALJ's interpretation reasonable, the Court finds no error established.

23 / / /

1 C. Non-examining State Agency Physicians

2 The ALJ accorded significant weight to Dr. Hander's opinions, finding his assessment
3 supported by objective medical findings and plaintiff's range of activities, and supporting the
4 RFC assessed. (AR 35-36.) He found the opinions of Drs. Reade and Brown consistent with
5 plaintiff's performance on consultative psychological evaluation, regular psychiatric screenings,
6 and her range of activities, and supporting the mental RFC assessed. (AR 36.)

7 Plaintiff's criticisms of the ALJ's assessment of this opinion evidence do not undermine
8 the substantial evidence support for the ALJ's decision. The ALJ, for instance, was required to
9 "consider", not explicitly list and discuss, a number of different factors in deciding the weight to
10 afford this evidence, including, but not limited to, the specialization of a physician and the
11 supportability and consistency of the opinions. *See* 20 C.F.R. §§ 404.1527(c), 416.927(c). Also,
12 while plaintiff denies her daily activities and the objective evidence cited by the ALJ support her
13 ability to perform sustained work activities, she again proffers and relies upon her own
14 interpretation of the evidence, without demonstrating the ALJ's interpretation was not rational.
15 The ALJ acknowledged plaintiff has "some physical and mental limitations," while reaching the
16 reasonable and well-supported conclusion the record did not support the degree of limitation
17 alleged. (AR 38.) Plaintiff fails to demonstrate error in the weight afforded the opinions of the
18 non-examining physicians. *See generally* 20 C.F.R. §§ 404.1527(e)(2)(i), 416.927(e)(2)(i); SSR
19 96-6p (State agency consultants are highly qualified and experts in the evaluation of disability
20 claims); and *Tonapetyan v. Halter*, 242 F.3d 1144, 1148-49 (9th Cir. 2001) ("Although the
21 contrary opinion of a non-examining medical expert does not alone constitute a specific,
22 legitimate reason for rejecting a treating or examining physician's opinion, it may constitute
23 substantial evidence when it is consistent with other independent evidence in the record.")

CONCLUSION

This matter should be REMANDED for further administrative proceedings. Remand should be limited to consideration of plaintiff's status in relation to applicable age categories.

DEADLINE FOR OBJECTIONS

Objections to this Report and Recommendation, if any, should be filed with the Clerk and served upon all parties to this suit within **fourteen (14) days** of the date on which this Report and Recommendation is signed. Failure to file objections within the specified time may affect your right to appeal. Objections should be noted for consideration on the District Judge's motions calendar for the third Friday after they are filed. Responses to objections may be filed within **fourteen (14) days** after service of objections. If no timely objections are filed, the matter will be ready for consideration by the District Judge on **October 21, 2016**.

DATED this 5th day of October, 2016.

Mary Alice Theiler
Mary Alice Theiler
United States Magistrate Judge